



1 subsequently moved to dismiss every Defendant except American Heritage. The state court  
2 granted the motion on October 22, 2008. Dkt. #1-3 at 2-3, 10. On November 7, 2008,  
3 Plaintiff filed a motion seeking to amend his complaint to again add the Allstate Defendants.  
4 The state court denied the motion. *Id.* at 12-13; Dkt. #1-4 at 64.

5 On May 26, 2009, American Heritage removed the case to this Court. Dkt. #1.  
6 Discovery was completed on October 1, 2009, and dispositive motions were filed by both  
7 parties on the deadline of October 23, 2009. Dkt. #46, 48. Plaintiff now seeks to add  
8 Allstate Corporation, which has never been a party to this action, as a defendant. Dkt. #36.  
9 Plaintiff argues that Allstate Corporation is the parent and liable for the acts of American  
10 Heritage. *Id.* at 1. American Heritage argues the amendment would be futile because the  
11 two companies are separate and distinct. Dkt. #50.

## 12 **II. Legal standard.**

13 Rule 15 of the Federal Rules of Civil Procedure declares that courts should “freely  
14 give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a). The Supreme Court  
15 has instructed that “this mandate is to be heeded.” *Foman v. Davis*, 371 U.S. 178, 182  
16 (1962). But the liberal policy favoring amendments is not unlimited. Motions to amend  
17 may be denied if the district court finds there has been (1) undue delay, (2) bad faith or  
18 dilatory motives on the part of the movant, (3) repeated failure to cure deficiencies by  
19 previous amendments, (4) undue prejudice to the opposing party, or (5) futility of the  
20 proposed amendment. *Id.*

## 21 **III. Corporate Separateness.**

22 The parties agree that Plaintiff’s proposed amendment is futile if Allstate Corporation  
23 and American Heritage cannot be regarded as the same entity. Dkt. #53 at 7; Dkt. #50 at 9.  
24 Arizona law recognizes a presumption of corporate separateness under which a parent  
25 corporation is not liable for the actions of a subsidiary. *Deutsche Credit Corp. v. Case*  
26 *Power & Equip. Co.*, 876 P.2d 1190, 1195 (Ariz. App. 1994). To prove otherwise, a plaintiff  
27 must show (1) unity of control and (2) that observance of the corporate form would promote  
28 injustice or fraud. *Gatecliff v. Great Rep. Life Ins. Co.*, 821 P.2d 725, 728 (Ariz. 1991).

1           **A.     Unity of Control.**

2           The parties agree that the controlling standard is found in *Gatecliff*. 821 P.2d 725.  
3   Under *Gatecliff*, unity of control is shown when a parent exercises “substantially total control  
4   over the management and activities” of its subsidiary. *Id.* at 728 (citations and internal  
5   quotations omitted). A plaintiff may prove substantially total control “by showing, among  
6   other things: stock ownership by the parent; common officers or directors; financing of  
7   subsidiary by the parent; payment of salaries and other expenses of subsidiary by the parent;  
8   failure of subsidiary to maintain formalities of separate corporate existence; similarity of  
9   logo; and plaintiff’s lack of knowledge of subsidiary’s separate corporate existence.” *Id.*  
10   The Court will consider each of these factors.

11           1.     Allstate Corporation owns the stock of American Heritage. Dkt. #36 at 3.

12           2.     Plaintiff has shown that the two companies share one officer and one director  
13   out of 28 officers and 16 directors. Dkt. #53 at 7-8; #50-1 at 45-51.

14           3.     Plaintiff has not shown that Allstate Corporation finances American Heritage.  
15   Plaintiff notes that Allstate Corporation’s annual SEC Form 10-K includes American  
16   Heritage’s financial information, and argues that this fact shows Allstate must finance  
17   American Heritage. Dkt. #53 at 8. But the few pages of the 10-K provided by Plaintiff say  
18   nothing about Allstate Corporation financing American Heritage (Dkt. #53, Ex. F), and  
19   Plaintiff has provided no authority to suggest that the common practice of including wholly-  
20   owned subsidiaries in a Form 10-K somehow shows that the parent finances the subsidiary.

21           4.     American Heritage concedes that Allstate Corporation pays its employees, but  
22   Plaintiff fails to show that Allstate Corporation pays for any other expenses of American  
23   Heritage. Dkt. #50 at 10.

24           5.     Plaintiff fails to show that American Heritage ignores or neglects corporate  
25   formalities. The evidence presented by the parties shows that American Heritage maintains  
26   its own headquarters in a state different from Allstate Corporation, files its own corporate  
27   reports, and underwrites its own insurance policies. *Id.* at 11.

28           6.     Plaintiff has shown similarity of the two companies’ logos. *Id.*

1           7.       Plaintiff claims that he did not know of American Heritage's existence, but  
2 American Heritage has produced numerous documents provided to Plaintiff showing that his  
3 insurance was with American Heritage, not Allstate Corporation. *Id.* at 2-5. Even if Plaintiff  
4 did not notice American Heritage's existence, he has not shown that American Heritage or  
5 Allstate Corporation somehow hid it.

6           In sum, Plaintiff has shown that Allstate Corporation owns the stock of American  
7 Heritage, that the two corporations have one officer and one director in common out of a total  
8 of 44 officers and directors, that Allstate Corporation pays the salaries of American Heritage  
9 employees, and that the companies have similar logos. On the other hand, the companies  
10 have largely separate officers and directors, Plaintiff has not shown that Allstate Corporation  
11 finances American Heritage, Plaintiff has not shown that Allstate Corporation pays expenses  
12 of American Heritage other than salaries, there is no evidence that the companies fail to  
13 observe corporate formalities, American Heritage maintains its own headquarters in a state  
14 different from Allstate Corporation, and there is no evidence that American Heritage's  
15 existence was somehow hidden from Plaintiff. Given this evidence, the Court concludes that  
16 a reasonable jury could not find that Allstate Corporation has "substantially total control over  
17 the management and activities" of American Heritage. *Gatecliff*, 821 P.2d at 728 (holding  
18 that substantially total control existed when the companies shared a vice president, when the  
19 parent performed virtually every service necessary for the subsidiary's operation, and when  
20 the two companies failed to distinguish between themselves in day to day operations).  
21 Plaintiff has not overcome the presumption of corporate separateness. *See Deutsche Credit*  
22 *Corp.*, 876 P.2d at 1190.

23           **B.       Injustice and Fraud.**

24           Nor does the Court find that observance of the corporate form would promote fraud  
25 or injustice. Plaintiff's motion asserts that the jury should be permitted to consider financial  
26 information of Allstate Corporation when assessing punitive damages. Dkt. #36 at 5. The  
27 Court cannot conclude, however, that the prospect of larger punitive damages is the kind of  
28 fraud and injustice addressed in the *Gatecliff* analysis, and Plaintiff has provided no authority

1 to suggest it is relevant.<sup>3</sup> Nor has Plaintiff explained why punitive damages awarded in the  
2 absence of Allstate Corporation would be inadequate.

3 Plaintiff argues in his reply memorandum that it would be unjust to permit Allstate  
4 Corporation to “hide” behind American Heritage while actually controlling the corporation.  
5 Dkt. #53 at 11. But this argument necessarily presumes that Allstate Corporation does  
6 control American Heritage, a fact Plaintiff has not established, as explained above.

7 Finally, Plaintiff argues for the first time in his reply memorandum that Allstate  
8 Corporation’s medical director makes decisions regarding medical issues, including decisions  
9 regarding the cancer screening test at issue in this case, and that Allstate therefore should be  
10 held liable for Plaintiff’s damages. *Id.* at 10. The Court will not consider this kind of a  
11 factual assertion made for the first time in reply. *Delgadillo v. Woodford*, 527 F.3d 919, 930  
12 n. 4 (9th Cir.2008).<sup>4</sup>

#### 13 **IV. Undue Delay.**

14 The Court also concludes that Plaintiff delayed unduly in seeking to amend his  
15 complaint. Plaintiff first named Allstate entities as defendants in July of 2008, and admits  
16 he learned that Allstate Corporation was the parent of American Heritage in December of  
17 2008. Dkt. #36 at 2; *see* Dkt. #1-3 at 21-26. And yet Plaintiff delayed his motion to amend  
18 until after expert witnesses had been disclosed, only two days of discovery remained, and  
19 dispositive motions were at hand. *See* Dkt. #25. His more than nine month delay was

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21 <sup>3</sup> The Arizona Supreme Court in *Gatecliff* found injustice when observance of the corporate  
22 form could have “den[ied] plaintiffs recovery from the party responsible for cancelling their  
23 insurance policy” and could have “permit[ed] the two corporations to confuse plaintiffs and  
24 frustrate their efforts to protect their rights before suit.” 821 P.2d at 729. Plaintiff will not  
25 be denied recovery if the corporate form is respected, nor will Plaintiff’s efforts to protect  
26 his rights be frustrated.

26 <sup>4</sup> Plaintiff may respond that the medical director was not deposed until October 8, 2009, after  
27 the motion to amend was filed. But Plaintiff first sought to name Allstate defendants in July  
28 of 2008, and knew by November of 2008 that Allstate Corporation owned American  
Heritage. Dkt. #36 at 2. Plaintiff had ample opportunity to complete any discovery  
necessary for a motion to amend well in advance of the closing stages of this case.

1 unreasonable. *See AmeerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 953 (9th  
2 Cir. 2006) (“We have held that an eight month delay between the time of obtaining a relevant  
3 fact and seeking a leave to amend is unreasonable.”). If the Court were to grant Plaintiff’s  
4 motion, issues of corporate form, corporate formalities, corporate financing, and corporate  
5 governance would be injected into this case at a time when discovery is complete, experts  
6 have been disclosed, and dispositive motions have been filed. Both American Heritage and  
7 the Court would be prejudiced if litigation of these substantial questions commenced when  
8 the discovery and motion schedule were complete.

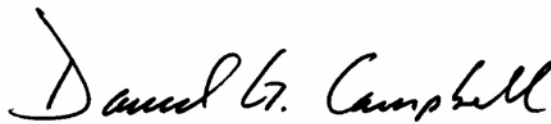
9 Plaintiff argues that the Court’s Case Management Order – entered after the case had  
10 been removed from state court – allowed the parties 60 days to amend pleadings, that he  
11 mentioned the possibility of adding Allstate Corporation as a defendant in the parties’  
12 Rule 26(f) filing, and that he filed his motion to amend within the 60 days of the Case  
13 Management Order. These assertions are all correct, but Plaintiff made no effort during the  
14 case management process to explain to the Court the significance of such an amendment, nor  
15 did he assert that more time was needed to determine whether the amendment would be  
16 appropriate. From the beginning of this case, Plaintiff has possessed all the discovery tools  
17 necessary to determine if this amendment was warranted. From at least December of 2008  
18 Plaintiff has known that Allstate Corporation owned American Heritage. Dkt. #36 at 2.  
19 Plaintiff, not Defendant or the Court, controlled the timing of his motion. The fact that  
20 Plaintiff mentioned the possibility of such an amendment during the case management  
21 process does not justify his delay, nor does it constitute some kind of informed consent by  
22 Defendant or the Court to a prejudicially untimely motion. Plaintiff chose to file the motion  
23 at the very close of discovery, and the Court properly may consider whether such a choice  
24 constitutes undue delay.

25 Entry of a Rule 16 deadline for amending pleadings does not eliminate the timeliness  
26 considerations of Rule 15. To the contrary, motions to amend may be found untimely even  
27 if they are brought within the time allowed by a scheduling order. *AmeerisourceBergen*, 465  
28 F.3d at 953 (holding that district court did not abuse its discretion in denying as untimely a

1 motion brought within the time allowed under the Rule 16 order). As the Ninth Circuit has  
2 explained: "In assessing timeliness, we do not merely ask whether a motion was filed within  
3 the period of time allotted by the district court in a Rule 16 scheduling order. Rather, in  
4 evaluating undue delay, we also inquire whether the moving party knew or should have  
5 known the facts and theories raised by the amendment in the original pleading." *Id.* Plaintiff  
6 knew in December of 2008 that Allstate Corporation was the parent of American Heritage.  
7 The Court concludes that he delayed unduly, and to the prejudice of Defendant and the  
8 Court, by waiting until now to file a motion to amend.

9 **IT IS ORDERED** that Plaintiff's motion to amend (Dkt. #36) is **denied**.

10 DATED this 9<sup>th</sup> day of December, 2009.

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David G. Campbell  
United States District Judge  
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